are entitled to the judgment they seek without a stay.

With regard to the counterclaim, I am of the opinion that the decision of the Chief Justice in ordering its exclusion was right. The counterclaim was not maintainable against the plaintiffs themselves but only against the company and is in relation to an entirely separate contract and in respect of a different vessel. It had nothing to do with the plaintiffs.

As Whitley J. indicated in *Koh Chooi Peng* v. *Chung Kok Sang & Ors.* [2] before a defendant can plead a counterclaim against a co-defendant along with the plaintiff he must satisfy the Court that the relief which he seeks is against *inter alios* the plaintiff and that the counterclaim relates to the subject matter of the plaintiff's claim.

It was urged upon us that as a matter of indulgence having regard to the circumstances of this case, we should give the defendants leave to serve the defence and counterclaim on the company because the convenience and justice of the matter require that the counterclaim be dealt with at the same time as the plaintiffs' claim. I am unable to accept this contention and I have been unable to find any authority to support it.

We were referred to the provisions of O.XXII rr.11 and 12 of the Rules of the Supreme Court which deal, *inter alia*, with claims by defendants against persons not parties to the action. Before those rules can be held to apply it must be shown that the plaintiffs were concerned jointly with the company in connection with the defendants' counterclaim which clearly they were not.

Furthermore, it would not, in my opinion, be right or proper to deprive the company of its right to arbitration in connection with this dispute under clause 23 of its Time-Charter Agreement with the defendants. There was apparently some doubt as to whether the arbitration had actually begun, but it is clear beyond question that the defendants had agreed to arbitration in London and this was acceptable to both sides.

For these reasons, therefore, in my judgment the counterclaim was rightly excluded under O.XXII r.15 of the Rules of the Supreme Court.

The order of the learned Chief Justice as to costs was, in my opinion, a proper exercise of his discretion in the matter. The facts in *M. Lee* v. *R.C.H. Lim & Co.* [3] are clearly distinguishable.

In the result, therefore, the appeal must be dismissed and the cross-appeal allowed in each instance with costs. Deposit to respondents.

Chua and Wee Chong Jin JJ. concurred.

Appeal dismissed.
Cross-appeal allowed.

Solicitors: *Allen & Gledhill; Drew & Napier.*

LEE BENG KONG v. COMPTROLLER OF INCOME TAX

[C.A. (Thomson C.J., Hill and Good JJ.A.) July 21, 1962]

[Penang — F.M. Civil Appeal No. 40 of 1961]

Practice and Procedure — Affidavit — Not clear what defence disclosed in — Failure to appeal against Income Tax Board of Review's decision — Appeal on assessment "determined on appeal" — Income Tax Ordinance, 1947, s.80.

This was an appeal from the decision of Barakbah J. ([1962] M.L.J. 60).

Held: the present case came fairly and squarely within the scope of section 80 of the Income Tax Ordinance and the appellant's affidavit disclosed no available defence. As the appeal on the assessment had been "determined on appeal", that section required that it shall be treated as final and conclusive.

COURT OF APPEAL.

S. A. Raj for the appellant.

Chang Min Tat for the respondent.

Thomson C.J.: This is an appeal from a decision of Barakbah J. whereby he dismissed an application by the appellant to have set aside a default judgment against him at the suit of the Comptroller of Income Tax for Income Tax and penalties amounting to $19,491.34 with interest.

The case arises from a long standing dispute between the appellant and the Income Tax authorities. Neither the early history nor the exact nature of that dispute is very clear though the basis of it would appear to have been a question as to whether certain money should be treated as capital or as income which attract tax.

In 1957, however, certain assessments in respect of the years 1950, 1951, 1952, 1953 and 1954 (the "disputed assessments") amounting in all with the addition of statutory penalties and with the deduction of a small sum paid on account to $19,491.34 were served on the appellant. The appellant objected to these assessments and although he did not comply with the provisions of section 72(2) of the Income Tax Ordinance ("the Ordinance") by stating the grounds of his objections these were considered by the Comptroller who dismissed them and on 14th January, 1959, caused notice of refusal to be served on the appellant. The appellant at that stage did not exercise his right of appeal to the Board of Review under section 75 of the Ordinance and after some correspondence a specially endorsed writ was issued against him on 6th October, 1959.

There was difficulty in serving the writ, but, six attempts at personal service having failed, on 14th March, 1960, an order was made for substituted service and on 18th March the appellant's solicitor entered appearance.

For some time previously a Kuala Lumpur firm of solicitors had been corresponding with the Comptroller on behalf of the appellant. Then, at some time prior to the issue of the writ, he

changed his lawyer and on 15th March, 1960, the day after the order for substituted service was made, his second lawyer gave notice of intention to appeal to the Board of Review against the Comptroller's decision of 14th January, 1959, whereby he refused to entertain the appellant's objections. Such an application was, of course, hopelessly out of time but although no formal application for extension of time would appear to have been made a letter was written saying that the appellant's delay was due to sickness.

There was further correspondence between the appellant's second lawyer and the Comptroller which it is not necessary to recount here beyond saying that in the course of it the Comptroller agreed to a defence to his action being filed out of time and undertook that he would not attempt to proceed with that action unless and until the appellant's appeal to the Board of Review was dismissed.

On 26th May, 1961, the Board of Review dismissed the appellant's appeal. The appellant did not appeal to the High Court against that decision under section 77 of the Ordinance. Neither had he filed any defence in the Comptroller's action. Judgment was accordingly entered against him on 1st July, 1961.

The appellant again changed his lawyer and on 14th August his third lawyer filed notice of motion to set aside the judgment of 1st July, 1961. That motion came on for hearing before Barakbah J. on 7th October and was dismissed by him on 11th November. It is against that dismissal that the present appeal has been brought.

It is, I think, common ground that there has been no irregularity in the proceedings and therefore before he could have the judgment of 1st July, 1961, set aside and be let in to defend the appellant had to shew that he had an arguable defence. In the circumstances of the case I do not think it is necessary to take that point further. He did file an affidavit in support of his application but all he said as to any defence he might have was contained in the following paragraphs:—

"I am advised and verily believe that I have a good defence to this action on the merits and that the plaintiff's claim is not maintainable by reason of the provisions of the Income Tax Ordinance, 1947 and subsequent amendments.

I say that the additional assessments raised on me by the plaintiff is illegal and *ultra vires* as the amounts on which the additional assessments were based do not constitute income for the purposes of the Income Tax Ordinance, 1947.

The assessments are bad in law and are void *ab initio*."

Now, it is by no means clear what defence is contained in these paragraphs and the affidavit contains no explanation why such defence as they may contain was not filed in the ordinary way after the Comptroller had consented to a defence being filed out of time. Barakbah J., however, took the view that any defence that might be extracted from the affidavit was by virtue of section 80 of the Ordinance not available to the appellant.

With respect, I agree.

The arrangements for the assessment and collection of Income Tax under the Ordinance are, generally speaking, similar to those in the United Kingdom except that there is no body exactly corresponding to the General Commissioners.

So far as they are material in the present case these arrangements are as follows. Assessments to Tax are made by the Comptroller of Income Tax under section 68 of the Ordinance. By section 72(2) if any person disputes an assessment made upon him he may apply to the Comptroller to have it reviewed and revised. Such an application must state precisely the grounds on which it is made. By section 72(4) if the taxpayer who has objected ultimately agrees with the Comptroller as to the amount of his assessment the assessment is to be amended accordingly.

Any person who has been aggrieved by an assessment and has failed to agree under section 72 with the amount assessed by the Comptroller is entitled by virtue of the provisions of section 75 to appeal to a Board of Review which is constituted by section 74. Notice of such an appeal must be given within seven days of the date of the refusal of the Comptroller to amend the assessment as desired and particulars of the grounds of appeal must be lodged within a further thirty days. These times may be extended by the Board. Where the amount of the tax payable exceeds $200 either the Comptroller or the taxpayer may appeal to the High Court from any decision of the Board upon any question of law or of mixed law and fact. By section 77(5) it is clear that there is a further right of appeal from the High Court to the Court of Appeal and of course subject to the provisions of the appropriate Ordinance there is an ultimate right of appeal to His Majesty the Yang di-Pertuan Agong.

Finally by section 80 it is provided as follows:—

"Except as expressly provided in this Ordinance, where no valid notice of appeal has been lodged within the time limited by this Part against an assessment, or where an assessment has been determined on appeal, the assessment as made or agreed to under sub-section (4) of section 72 of this Ordinance, or determined on appeal, as the case may be, shall be final and conclusive for the purposes of this Ordinance:"

That section was amended by Ordinance No: 53 of 1958 and it has been quoted as it read at the date of issue of the writ. It may be that Barak-

bah J. had in mind the wording of the section as it read prior to its amendment. The differences in wording between the old section and the new section, however, would appear to have no bearing on the present case and therefore do not call for discussion.

In my view the present case comes fairly and squarely within the scope of section 80. Here there has been an assessment. There has been an appeal and the assessment has been "determined on appeal". In the circumstances the section requires that it shall be treated as final and conclusive.

At one time there would appear to have been some suggestion that the appellant had it in mind to attempt to have his tax liability settled by the Court by way of a suit for a declaration. I express no view one way or the other as to whether it was open to him to do so. Nor do I express any opinion as to whether it is or has been open to him to proceed by the issue of one of the prerogative writs. I only observe that he has made no attempt to do anything of the sort during all the years his dispute with the Income Tax authorities has been going on.

What we are concerned with here is not a hypothetical declaratory suit or a hypothetical prerogative writ but actual proceedings taken against the appellant by the Comptroller. In my view section 80 concludes these proceedings and the appellant's affidavit discloses no available defence to them.

I would add that it is impossible to feel any sympathy with the appellant. This is not a case of an ignorant taxpayer having to fight against the resources of a powerful Government Department. The appellant has at all times been legally represented. In spite of that he has throughout either been reluctant or has refused to avail himself of the remedies provided by the Ordinance. He did not go to the Board of Review until proceedings had been commenced against him and then when his appeal to the Board of Review had failed he did not avail himself of his remedy of appealing to this Court against the decision of the Board.

In all the circumstances I would dismiss the appeal with costs.

Hill and **Good JJ.A.** concurred.

Appeal dismissed.

Solicitors: *Gibb & Co.; Chang Min Tat.*

ZAKARIA & ORS. v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good JJ.A.) August 15, 1962]

[K.L. — F.M. Criminal Appeal No. 28 of 1962]

Criminal Law and Procedure — Trial by jury — Objections to jurors — Objection without grounds — Joint trial — Criminal Procedure Code (Cap. 6), s.206(ii).

Where three persons are charged jointly and are about to be tried jointly each of them is entitled to object to four members of the jury panel without showing cause.

Case referred to:—

(1) *R.* v. *Williams* 19 Cr. App. R. 67.

COURT OF APPEAL (CRIMINAL).

Wan Mustapha bin Haji Ali for the appellants.

Harun Hashim (Deputy Public Prosecutor) for the respondent.

Thomson C.J. (delivering oral judgment): These appellants were tried for an offence of murder in contravention of section 302 of the Penal Code. In the event they were convicted for culpable homicide not amounting to murder in contravention of section 304 and each of them was sentenced to seven years' imprisonment. Against these convictions they have appealed on a variety of grounds.

We find it necessary to consider one of these grounds only.

That ground arises from something which happened at the commencement of the trial. Counsel who was representing all three prisoners proceeded to exercise the right of peremptory challenge as the jury were being chosen. He challenged four of the panel and was then stopped and was told that his clients' rights of challenge were exhausted.

This was clearly wrong.

Section 206(ii) of the Criminal Procedure Code which deals with the question of challenging jurors says:—

"Objections without grounds stated shall be allowed to the number of four on behalf of the person or each of the persons charged."

On that where, as in the present case, three persons are charged jointly and are about to be tried jointly each of them is entitled to object to four members of the jury panel without showing cause. The present appellants were denied that right and therefore we are compelled on the authority of a very long series of English cases of which it is only necessary to mention *R.* v. *Williams* (1) to hold that the trial was a nullity.

In the circumstances we have no option but to set aside the convictions and to state the ground on which we do so. The question of what happens subsequently is at this stage no concern of ours. There has been no trial and it is for the Public Prosecutor to take such steps as he sees fit.

Conviction set aside.